used as a burial ground. As to this, Hepworth J. held against the plaintiff, on the principle enunciated is *In re Scholfieldes Will's Trusts*, and *Scholfield* v. *Scholfield & Ors.*[1] In the instant case this point does not call for a decision. All that the plaintiff seeks to establish is that, as no burial will be permitted by Government in future on the nine lots, the subject of the collector's letter dated 23rd September, 1966, the trust has become impossible of performance and consequently there is a resulting trust in favour of the plaintiff.

In view of the above, I think that it is open to the court to consider the plaintiff's application.

In my judgment it has no merits.

The plaintiff's present application is based on two things.

First, as the Government no longer permits nine lots to be used as burial grounds, the trust has become impossible of performance.

Secondly, since the earlier proceedings the plaintiff has executed a separate deed of declaration of trust on 15th August, 1967, that is, after the disposal of the appeal against Hepworth J.'s judgment. This declaration begins at page 50 of the record. It will be recalled that the indenture of 17th September, 1930, creating the trust stated that the lands shall be held by the trustees "upon the trust and conditions *to be by a separate deed of declaration of trust hereinafter declared* concerning the same." The deed of declaration subsequently executed by the plaintiff states in clause 6 that "in the event of the Commissioner of Land at Penang or any other Government officer forbidding further burials on the said hereditaments or any part thereof, then and in such an event the present trustees shall reconvey the part or parts on which no further interments are permitted to the [plaintiff] and on failure of the present trustees to reconvey as aforesaid after written demand by the [plaintiff], then the [plaintiff] shall be at liberty to proceed under clause 5 hereof".

Clause 5 is in the following terms:—

"The [plaintiff] may at any time or times by deed wholly withdraw from the trust for his own benefit or otherwise and without substituting any equivalent for same, any portion or portions, or the whole of the said hereditaments, and may by such deed revoke all the limitations, trusts, powers, and provisions declared in the appointment indenture of or concerning the lands so withdrawn, and may by the present trustees of funds the subject of the said trust."

The plaintiff argues that these two clauses expressly reserve a power to revoke the trust and consequently on his application to the court there is created a resulting trust in respect of the lands in his favour.

As to his first argument, there is evidence that burial is prohibited on nine lots but there is no evidence that burial has been forbidden on *four other lots*, namely Nos. 13(2), (3), (4) and 43(2) totalling in area 4 roods 21 poles. So there has been failure of only *part*, not of the whole purpose of the trust, and the plaintiff cites no authority before us establishing that in the event of partial failure, a resulting trust is created in his favour in respect of all or any of the lands.

As to his second argument, it is true that where an express trust is created it may be revoked if a power of revocation is expressly reserved. But I do not agree with the plaintiff's argument that the indenture of 17th September, 1930, and the declaration of trust of 15th August, 1967, should be read as one instrument. Hepworth J. in the earlier proceedings held that the indenture of 17th September, 1930, was complete in itself and required no separate deed of declaration of trust; and I am of the view that if it was desired to reserve a power of revocation, it should have been so reserved in the 1930 indenture. That was not done and it was too late for the plaintiff to reserve this power 37 years later, in 1967.

In the result, with respect I agree with Ong Hock Sim J.'s conclusion though for different reasons.

I would therefore dismiss this appeal.

Costs to be paid by the plaintiff.

Gill F.J.: I have had the benefit of reading the judgments in draft of the Lord President and of my brother Suffian, and I agree that this appeal should be dismissed for the reasons stated by them.

Appeal dismissed.

Solicitors: *Ong Huck Lim & Co.; Lim, Lim & Oon.*

LIEW SIEW & ANOR v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) July 1, 1969]

[Perak — Criminal Appeal No. 12 of 1969]

Criminal Law and Procedure — Application for certificate for appeal to Federal Court on ground that principle of law is involved — Onus on accused — Whether defence under duty to call witnesses offered to it by prosecution — Whether failure to call any witness justifies adverse inference against defence — Presumption under Road Traffic Ordinance, 1958, s. 144(b).

Road Traffic — Pirate taxi — Passengers — Failure to call one of, as witness — Presumption — Road Traffic Ordinance, 1958, s. 144(b).

In this case the appellant had been convicted of the offence of carrying passengers in a motor vehicle for hire or reward. At the trial all the passengers found in the car when it was detained were offered by the prosecution to the dcfence as witnesses. The defence called all but one of these passengers. The passengers who were called by the defence all testified that they had not paid nor had intended to pay any fare. On appeal against the conviction the appeal was dismissed. An application thereupon was made for a certificate to enable a further appeal to be made to the Federal Court and it was alleged in support of the application that several points of law arose in the appeal *viz.*, (a) whether the defence is under a duty to call all the witnesses offered to it by the prosecution; (b) whether, if the defence omits to call one of the witnesses offered to it by the prosecution, it is legitimate and permissible and whether the court ought to draw an inference unfavourable to the defence from such failure; (c) whether the failure on the part of the defence to call any witness at all offered by the prosecution to it justifies any adverse inference being drawn against the defence; and (d) whether, having regard to the grounds of judgment of the learned magistrate which was upheld on appeal, the learned magistrate had not introduced into the law a test which is unwarranted by the authorities.

Held: (1) the defence under normal circumstances and when no presumption arises is under no duty to call all or even any of the witnesses offered to it by the prosecution, as all the defence has to do is to raise a reasonable doubt on the truth of the prosecution evidence and if that has been done, it is entitled to an acquittal;

(2) the court cannot draw any inference unfavourable to the defence for failure to call any witnesses;

(3) the answers to the points of law posed in this case are so straight forward and simple that there can be no useful purpose in referring them for the decision of the Federal Court;

(4) in this case a presumption arose under section 144(b) of the Road Traffic Ordinance that the passengers in a motor vehicle were being carried in consideration of separate payments made by them and as the accused has not rebutted this presumption in respect of one of his passengers, he was rightly convicted of the offence.

CRIMINAL APPEAL.

N.H. Chan for the applicants.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J. (delivering oral judgement): I think I should explain more fully today the reasons why the appeal which led to this application was dismissed, since I consider that if they had been understood, this application would not have been made.

The certificate asked for purports to refer to certain so-called points of law and I now quote from the application:—

(a) Whether the defence is under a duty to call all the witnesses offered to it by the prosecution;

(b) Whether, if the defence omits to call one of the witnesses offered to it by the prosecution, it is legitimate and permissible and whether the court ought to draw an inference unfavourable to the defence from such failure;

(c) Whether the failure on the part of the defence to call any witness at all offered by the prosecution to it justifies any adverse inference being drawn against the defence; and

(d) Whether having regard to the grounds of judgment of the learned magistrate which was upheld on appeal, the learned magistrate has not introduced into the law a test which is unwarranted by the authorities.

I propose, in the first place, to ascertain whether there are any doubts in the principles of summary trials involved in these questions before proceeding on to the consideration whether the learned trial magistrate at the first instance has or I on appeal have transgressed any of these principles. But before doing so, it is convenient at this stage to comment on the fourth question. With respect, to my mind, this fourth question which was whether the magistrate had not introduced into the law a test which is unwarranted by the authorities is not a question properly so-called. It is an oblique comment on what the learned trial magistrate had done or was alleged to have done at the trial. What that test is is not clarified but perhaps it is implied that the magistrate had cast on the accused a burden of proof that is unwarranted. The reply will be seen to be implicit in the answers to the other questions.

As for the first question, the answer is very simple. The defence under normal circumstances and when no presumption arises is under no duty to call all or even any of the witnesses offered to it by the prosecution. That, I think, is abundantly clear on the authorities. All that the defence has to do is to raise a reasonable doubt on the truth of the prosecution evidence and it is, if it has done so, entitled to an acquittal. That burden could be discharged even by the cross-examination of the prosecution witnesses and, if it has achieved its goal, the magistrate is under a duty to discharge and acquit the accused without calling on the defence. When the defence is asked, then the defence has the absolute discretion to call any witnesses it chooses. It even has the right, the constitutional right of not calling any evidence or remaining mute of malice. So long as the defence has managed to raise a reasonable doubt then again it is entitled to an acquittal. But the discretion lies with the defence and there is no right on the prosecution or on the judge to direct the defence as to how it should proceed with its conduct of the defence or how it should present its defence or call its witnesses.

As for the second question it has been said in so many cases that the court cannot draw any inference unfavourable to the defence from

the failure to call any witnesses. I do not think that there is any doubt in this proposition or in the other proposition posed in the third question, which is in so similar terms as the second question that I can see no valid difference between them. As I have said the question posed goes to the elementary principles of similar trials. The answers to these fundamental questions are so straight-forward and simple that I do not see any useful purpose in referring them for the weighty decision of the Federal Court.

The purpose of this application is, of course, to obtain the re-hearing of an appeal that was dismissed and that would have ended at the High Court, unless the High Court judge can be persuaded that a principle of law is involved which requires the determination of the Federal Court.

Now this case was a case of a pirate taxi. At the trial all the passengers found in the car when it was detained were offered by the prosecution to the defence as witnesses. The defence called all but one of these passengers. The passengers who were called by the defence all testified that they had not paid nor had intended to pay any fare. One passenger was not called and it is in respect of this one passenger that all these so-called questions were posed. It would appear to be suggested that the dismissal of the appeal was as a consequence of the adverse inference drawn from not calling this witness. However, if my memory serves me right, at the hearing of the appeal I invited counsel for the appellant to address me on the operation and meaning of section 144(b) of the Road Traffic Ordinance which reads:—

"that the passengers carried in a motor vehicle were being carried in consideration of separate payments made by them;".

Mr. Chan has, if I recall, dealt with this presumption in another appeal. It is for this reason as I understand that he could not find anything useful to urge on me. It will therefore be seen that this case was not the ordinary case where the burden lies at all times on the prosecution to prove the guilt of the accused. It is a case dealing with a presumption of law. Here the presumption is that each passenger is presumed to make a separate payment. If this is so, then if any car was carrying five passengers and four gave evidence that they were not passengers in a taxi, had not paid or intended to pay any fare in such a way that they were accepted as witnesses of truth by the magistrate, there remained the status of the fifth passenger. The presumption still arises in respect of the fifth passenger and, if the fifth passenger is not called to give evidence to rebut the prosecution and to prove the contrary on a balance of probabilities, then the presumption means that he is a fare-paying passenger and the driver of the taxi must stand convicted on the pirate taxi charge, since he has carried one passenger for hire or reward.

As I said before, I invited the then counsel for the appellant to address me on this presumption. No address was made. I cannot help feeling that if an effort was made to understand or to try to understand the decision of the Bench, this application would have been unnecessary. To say the least, the questions posed lacked that honesty that I think the Bench is entitled to receive or to expect.

This application is dismissed.

Application dismissed.

Solicitors: *Cheang Lee & Ong.*

WONG SEE KUI v. HONG HIN TIN MINING CO.

[OCJ. Raja Azlan Shah J.) July 11, 1969]
[Kuala Lumpur — Civil Suit No. 620 of 1967]

Tort — Trespass — Nuisance — Negligence — Proof of damage — Claim to concurrent possession — Deposit of tailings into fishpond held by plaintiff under T.O.L.

Mining — Tailings from mine — Dumping of — Licenced by authority — Whether liable to trespass.

The plaintiff held a temporary occupation licence in respect of a pond for use as a fishpond. The defendant company obtained a licence for mining operations on certain nearby land and one of the conditions of the licence was that tailings from the land should be deposited on the land in which the plaintiff's pond was. The defendant company started to dump into the plaintiff's pond and the plaintiff thereupon brought an action for trespass, nuisance and negligence. No evidence was brought by the plaintiff to show the damage caused by the dumping.

Held: (1) as the plaintiff had not shown that he had suffered damage from the acts of the defendant company, the claims for nuisance and for negligence must fail;

(2) as the defendant company had a licence from the Mines Department to dump their tailings into the pond, their acts of dumpings were equivelant to acts of concurrent possession and they were not therefore liable for trespass.

[*Editorial Note:* Reference may be made to the Federal Court decision in *Guan Soon Tin Mining Co.* v. *Wong Foon Kum* [1969] 1 M.L.J. 99].

Cases referred to:—

(1) *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880.

(2) *Munday Ltd.* v. *London County Council* [1916] 2 K.B. 331.

(3) *East Suffolk Rivers Catchment Board* v. *Kent* [1940] 4 All E.R. 527 at p. 532.